

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

BERNICE GIST,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	NO: 01-2754
JO ANNE B. BARNHART,	:	
Commissioner of Social Security,	:	
Defendant.	:	

**GREEN, S.J.**

**AUGUST \_\_\_\_, 2002**

**MEMORANDUM/ORDER**

Presently before the Court are the parties' cross-motions for summary judgment.<sup>1</sup> On May 24, 2002, United States Magistrate Judge Linda K. Caracappa filed a Report recommending that this Court grant Defendant's motion for summary and deny Plaintiff's motion for summary judgment. After careful and independent consideration of the matter, and for the reasons set forth below, Plaintiff's motion for summary judgment will be granted.

**I. Factual and Procedural Background**

On August 12, 1998, Bernice Gist ("Plaintiff") applied for Disability Insurance Benefits ("DIB") under Title II, 42 U.S.C. §§ 401-33, and Part A of Title XVIII, 42 U.S.C. §§ 1395c - 1395i of the Social Security Act, and Supplemental Security Income ("SSI") under Title XVI, 42 U.S.C. §§ 1381 - 1385, alleging a disability due to severe back pain and high blood pressure.<sup>2</sup> Plaintiff's applications were denied initially and upon reconsideration, after which Plaintiff

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<sup>1</sup> Plaintiff's Motion for Summary Judgment also requests, as alternative relief, for the matter to be remanded to the Commissioner if summary judgment on her behalf is inappropriate. Also, Plaintiff filed a Reply to Defendant's motion for summary judgment, and this reply was considered by the Magistrate Judge and this Court.

<sup>2</sup> The Procedural History and the Factual History of the Report (pages 1-5) are approved, adopted and incorporated herein by reference.

requested a hearing before an Administrative Law Judge (“ALJ”). The hearing was held on October 15, 1999. On January 14, 2002, the ALJ issued his opinion which concluded that Plaintiff was not entitled to DIB or SSI benefits. The Plaintiff’s request for review was denied by the Appeals Council on April 4, 2001, thereby making the decision of the ALJ the final decision of the Commissioner.

Plaintiff then filed the instant matter seeking review of the Commissioner’s decision, pursuant to 42 U.S.C. § 405(g), which grants federal courts the power to review a final decision of the Commissioner regarding a claimant’s eligibility for disability benefits. Both parties then filed their motions for summary judgment, and Plaintiff filed a Reply to the Commissioner’s motion. Pursuant to Local Rule of Civil Procedure 72.1 and 28 U.S.C. § 636(b)(1)(B), this Court then referred the matter to United States Magistrate Judge Linda K. Caracappa. After careful consideration and review of the record, Magistrate Judge Caracappa filed a report recommending that this Court grant Defendant’s motion for summary judgment, and deny Plaintiff’s. Both parties were served with copies of the Magistrate Judge’s report and recommendation. Pursuant to Local Rule of Civil Procedure 72.1 IV (b) and 28 U.S.C. § 636(b)(1)(C), Plaintiff timely filed written objections to the Magistrate Judge’s report and recommendation.

## **II. Scope of Review**

A district court judge may refer an appeal of a decision of the Commissioner to a magistrate judge. See 28 U.S.C. § 636(b)(1). Within ten days after being served a copy of the magistrate judge’s report and recommendation, a party may file timely and specific objections thereto. See 28 U.S.C. § 636(b)(1)(C). The district court judge will then make a *de novo*

determination of those portions of the report and recommendation to which objection is made. See id. The judge may accept, reject, modify, in whole or in part, the findings or recommendations made by the magistrate, receive further evidence or recommit the matter to the magistrate with instructions. See id.

In reviewing the Commissioner's decision, the Court is bound by the ALJ's findings of fact if they are supported by substantial evidence in the record. See 42 U.S.C. § 405(g). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate." Plummer v. Apfel, 186 F.3d 422, 427 (3d Cir. 1999).

There is a five-step sequential evaluation conducted when considering disability claims. When an impairment meets or equals a listed impairment, the claimant is considered disabled without consideration of her age, education, and work experience. Mental retardation is one of the listed impairments. See 20 C.F.R. Pt. 404, Subpt. P, App. I, § 12.05.

### **III. Discussion**

Pursuant to 28 U.S.C. § 636(b)(1)(C), the Plaintiff timely filed six objections to the Magistrate Judge's Report and Recommendation. Plaintiff's first objection is to the Magistrate Judge's conclusion that substantial evidence supports the Commissioner's finding that the Plaintiff does not meet or equal Listing 12.05 of the Listing of Impairments ("Listing 12.05"). Listing 12.05 considers the mental retardation, if any, of the benefit-seeker.<sup>3</sup> Of relevance to the

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<sup>3</sup> Listing 12.05 reads, in pertinent part, as follows:

12.05 Mental retardation: Mental retardation refers to significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested during the developmental period; i.e., the evidence demonstrates or supports onset of the impairment before age 22.

The required level of severity for this disorder is met when the requirements in A,

instant matter is the ALJ's determination that Plaintiff did not meet the required level of severity under sub-sections B or C of this Listing.

A. Criteria for Listing 12.05(B).

To determine the specific criteria for Listing 12.05(B), it is necessary to understand how the Court of Appeals for the Third Circuit has dealt with Listing 12.05(C). The Third Circuit has concluded that a claimant is presumptively disabled pursuant to sub-section C under the following criteria: "a) he is mentally retarded as evidenced by an IQ between 60 and 70, and has been so since before the age of 22; and b) he has another impairment, in addition to the mental retardation, that imposes an additional and significant work-related limitation of function." See Williams v. Sullivan, 970 F.2d 1178, 1184 (3d Cir. 1992).

The Third Circuit has not specifically decided whether, under sub-section B, a claimant

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B, C, or D are satisfied.

A. Mental incapacity evidenced by dependence upon others for personal needs (e.g., toileting, eating, dressing, or bathing) and inability to follow directions, such that the use of standardized measures of intellectual functioning is precluded;  
Or

B. A valid verbal, performance, or full scale IQ of 59 or less;  
Or

C. A valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing an additional and significant work-related limitation of function;  
Or

D. A valid verbal, performance, or full scale IQ of 60 through 70, resulting in at least two of the following:

1. Marked restriction of activities of daily living; or
2. Marked difficulties in maintaining social functioning; or
3. Marked difficulties in maintaining concentration, persistence, or pace; or
4. Repeated episodes of decompensation, each of extended duration.

20 C.F.R. Pt. 404, Subpt. P, App. I, § 12.05.

must prove that the mental retardation at issue was manifested during the developmental period, because the Third Circuit's ruling in Williams only considered sub-section C of Listing 12.05. However, I conclude that the Third Circuit would follow its conclusion in Williams, and extend Williams to sub-section B, requiring manifestation of mental retardation before the age of 22. Therefore, to be presumptively disabled pursuant to sub-section B, a claimant must show that he is: a) mentally retarded as evidenced by an IQ of 59 or less; and b) has been so since before the age of 22.<sup>4</sup>

B. Whether Plaintiff is mentally retarded as evidenced by an IQ of 59 or less.

Before considering whether Plaintiff has shown deficient intellectual functioning prior to her twenty-second birthday, I must determine what IQ Plaintiff has manifested. Plaintiff argues that, in considering the results of an IQ test, a judge should incorporate the Standard Error of Measurement (SEM) into the score. A SEM is the measurement error of assessment regarding IQ scores. The test administered to the Plaintiff has a 5 point SEM. Plaintiff argues that, "in determining whether a disability exists, one should use the lowest score available for a claimant who has taken a test that reports multiple scores." (See **Pltf.'s Objections** at 2 (citing 20 C.F.R. Pt. 404, Subpt. P, § 12.00(D)).) Plaintiff registered a full scale IQ score of 62, which, taking the SEM into consideration as Plaintiff argues, produces an IQ range of 57 - 67, and should be read as a score of 57. I agree.

In Hampton v. Apfel, No. Civ. A. 97-6651, 1999 WL 46614, at \*3 (E.D. Pa. Jan. 6,

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<sup>4</sup> Of course, under Listing 12.05(B), the third criteria for Listing 12.05(C) – the existence of another impairment, in addition to the mental retardation, that imposes an additional and significant work-related limitation of function on the claimant – need not be established. Upon a showing of the two other criteria, a claimant can be found presumptively disabled.

1999), Judge Pollack considered this exact issue, and determined that it is reasonable to apply the margin of error when considering the results of an IQ test. Judge Pollack further concluded that, since the regulations direct that in determining “whether a disability exists, one should use the lowest score available for a patient who has taken a test that reports multiple scores [, and that it] is reasonable to apply the same underlying rationale – error on the side of the claimant – in the context of testing error as well.” See Hampton, 1999 WL 46614 at \*3. I accept and adopt Judge Pollack’s reasoning, and conclude that Plaintiff’s IQ score should be read as 57, said score falling within the range established by Listing 12.05(B).<sup>5</sup>

C. Whether Plaintiff manifested mental retardation before the age of 22.

Having concluded that Plaintiff meets the required IQ score under Listing 12.05(B), I will now consider whether Plaintiff manifested any mental retardation before the age of 22.

Magistrate Judge Caracappa, relying on Williams, concluded that the Plaintiff failed to carry her burden under Listing 12.05, because Plaintiff failed to produce evidence that her deficient intellectual functioning existed prior to her twenty-second birthday. (See Report at 8-9.)

Plaintiff objects to this finding on two grounds. First, Plaintiff argues that “a low IQ test score raises a presumption of manifestation during the developmental period.” (See Pltf.’s Objections at 4 (citing to Hampton v. Apfel, No. Civ. A. 97-6651, 1999 WL 46614, at \*4 (E.D. Pa. Jan. 6, 1999)).<sup>6</sup> In the alternative, Plaintiff argues that she did raise sufficient evidence, other than a

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<sup>5</sup> The ALJ did not discuss, and apparently did not consider, Plaintiff’s argument that her IQ score should incorporate the SEM. Magistrate Judge Caracappa concluded that Plaintiff could not prove the manifestation of retardation during the developmental period, and therefore, did not consider whether Plaintiff’s IQ score should incorporate the SEM. (See Report at 9 n.7.)

<sup>6</sup> To support her position, Plaintiff offers a case from this Court, as well as cases from the Courts of Appeals for the 4<sup>th</sup>, 8<sup>th</sup> and 11<sup>th</sup> Circuits. However, since they appear to disagree with

low IQ, to support her claim that her deficient intellectual functioning existed prior to her twenty-second birthday. (See **Pltf.'s Objections** at 5-9.)

The Williams court appears to have answered the question of whether a low IQ score raises a presumption of manifestation during the developmental period, and concluded that it does not. See Williams, 970 F.2d at 1185 (“Williams’ IQ score is not sufficient, however, to establish deficient intellectual functioning initially manifested during the developmental period (before age 22). [The IQ report at issue] measured only his current intellectual functioning, and did not document lifelong mental retardation.”) (internal citations and quotations omitted). Other evidence, therefore, is required in order to demonstrate that Plaintiff’s deficient intellectual functioning was manifested during the developmental period.

Plaintiff argues that she did present additional evidence at the hearing in front of the ALJ. Plaintiff testified that she attended special education classes while in school because of difficulties she had with reading and mathematics, though, after having been out of school for over 30 years,<sup>7</sup> she was unable to produce any school records to support her testimony.<sup>8</sup> Plaintiff

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binding precedent from the Third Circuit, these cases are not followed for their position on this issue in the instant action.

<sup>7</sup> Plaintiff, born August 5, 1945, testified at the hearing in front of the ALJ that she had attended school through 10<sup>th</sup> grade, and was in special education classes. (See Tr. at 27.) In her Disability Report, it is written that she completed 11<sup>th</sup> grade at William Penn High School. (See Tr. at 76.) Either way, since Plaintiff was 54 years old at the time of the hearing, it is clear that she had been out of school for over 30 years.

<sup>8</sup> Plaintiff further testified that she has difficulties performing chores at home, including self-care, home living and food preparation, and that she did not have any hobbies or belong to any groups or clubs. However, this evidence does not shed any light on her mental capacity during the developmental period. It only shows, if anything, that Plaintiff may be mentally disabled now.

argues that both Magistrate Judge Caracappa and the ALJ failed to properly credit this testimony, and improperly discounted it. In addition to noting that there was no documentary evidence to support Plaintiff's assertion that she attended special education classes, the ALJ stated that "children are assigned to special education classes for disciplinary problems as well as intellectual deficits; thus even if . . . she was in special ed it would not establish that it [was] because of intellectual deficits." (See Tr. 13.) Plaintiff argues that this is a logically flawed and inconsistent conclusion, and is not supported by substantial evidence. I agree.

It is clear that Plaintiff currently possesses a deficiency in her intellectual functioning. Furthermore, Plaintiff has testified that she attended special education classes while in school, during her developmental period. Once a plaintiff shows an IQ test which establishes present proof of mental retardation, and such evidence that would support a finding that the condition pre-existed her twenty-second birthday, she is presumptively disabled under Listing 12.05(B). That presumption is rebuttable, and the government could, once that presumption is established, present evidence to contradict it. See Williams, 970 F.2d at 1186 ("Had [Williams' evidence] been sufficient to show Williams was mentally retarded prior to age 22, the Secretary would have had to proffer evidence to counteract his claim of disability under the regulations.") However, absent evidence to contradict this presumption, a plaintiff's evidence will carry the day.

Defendant did not present evidence to contradict this presumption at the ALJ hearing. Defendant merely argued, in its motion for summary judgment, that Plaintiff's attendance in special education classes could have been behaviorally and not mentally mandated. But, as stated above, once Plaintiff satisfies the pre-requisites of Listing 12.05(B), the government must show some evidence to rebut the presumption that Plaintiff is disabled, and not simply supply

theories which could possibly contradict Plaintiff's evidence. Without rebutting the presumption with evidence, the presumption must stand.

Furthermore, considering the IQ test which establishes that Plaintiff currently possesses a deficiency in her intellectual functioning, and no evidence that she has other anti-social or behavioral problems, it is illogical to assume that Plaintiff was placed in special education classes for any reason not related to her deficient intellectual functioning. There is no evidence to support the ALJ's suggestion that Plaintiff's placement in special education classes was solely a result of disciplinary problems, and, indeed, present regulations and guidelines clearly require evidence of a mental disability in order for a student to qualify for placement in a special education program. See, e.g., Philadelphia School District's Special Education Definitions, at [http://www.phila.k12.pa.us/osess/sswd/defn\\_disabilities.html](http://www.phila.k12.pa.us/osess/sswd/defn_disabilities.html) (providing current eligibility requirements for access to special education classes in the Philadelphia School District). While the present regulations do not require the child to be free from disciplinary problems, they do require that she manifest a mental disability. The existence of a mental problem is not, as the ALJ concluded, a *possibility* for a student in special education classes, but, rather, a *pre-requisite*. The present regulations clearly contradict the ALJ's conclusion, because some measure of mental difficulty is required.

I conclude that Plaintiff's un-refuted testimony that she attended special education classes while in school prior to her twenty-second birthday, combined with uncontradicted evidence that she currently possesses a low IQ, provide sufficient evidence to show that she possessed deficient intellectual functioning during the developmental period. Because there is no contradictory evidence which could refute Plaintiff's testimony regarding her enrollment in special education

classes, the ALJ cannot diminish the testimony by concluding, without evidence, that Plaintiff may have been assigned to these classes for behavioral rather than mental disability reasons. Also, the ALJ could have ordered new IQ testing if it was determined that the IQ test at issue was either incomplete or unreliable.<sup>9</sup> But, having accepted the IQ test, the ALJ cannot, without other compelling evidence or explanation, reject it.<sup>10</sup>

In Williams, the Third Circuit unequivocally stated that, after a claimant produced evidence sufficient to show mental retardation manifested during the developmental period, the burden switches to the Commissioner to counteract his claim of disability under the regulations. See Williams, 970 F.2d at 1186. I conclude that the record, on summary judgment, discloses that Plaintiff's IQ score is a 57, and Plaintiff has shown sufficient evidence of deficient intellectual functioning prior to the age of 22, which therefore qualifies her as "mentally retarded" pursuant to Listing 12.05(B).<sup>11</sup> Therefore, substantial evidence shows that Plaintiff is disabled, and

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<sup>9</sup> The ALJ and Defendant both conclude that the IQ score at issue is not as reliable as it could be due to Plaintiff's failure to fully and voluntarily participate in the testing process. But, as stated, if the test was determined to be unreliable, the ALJ could have ordered new testing. Furthermore, the ALJ failed to explain whether Plaintiff's mental retardation could have been the cause for her lack of attention or effort while being administered the IQ examination. Of course, such an explanation should be made by a competent medical professional, but, in the absence of such an explanation, it is improper for the ALJ to rely on his uncorroborated reasoning to reject a duly conducted examination. Finally, it must be noted that while the doctor who administered the IQ exam did mention Plaintiff's apparent lack of effort, he ultimately concluded that Plaintiff functioned "in the mild mental retardation to borderline range of intellectual functioning." (See Tr. at 147.) The ALJ's decision to accept some conclusions in the IQ test and ignore others is not supported by substantial evidence.

<sup>10</sup> Having determined that the ALJ's decision will be reversed, it is not necessary to consider Plaintiff's other objections.

<sup>11</sup> I note that several circuits have recognized the presumption that an individual's IQ remains relatively constant throughout her life. See, e.g., Sird v. Chater, 105 F.3d 401, 402 & n.4 (8<sup>th</sup> Cir. 1997); Guzman v. Bowen, 801 F.2d 273, 275 (7<sup>th</sup> Cir. 1986); Branham v. Heckler, 775

substantial evidence does not support the ALJ's decision to disregard Plaintiff's unrebutted testimony.

#### **IV. Conclusion**

For the foregoing reasons, I will sustain Plaintiff's First Objection to the Report and Recommendation of Magistrate Judge Linda K. Caracappa. Plaintiff's motion for summary judgment will be granted, Defendant's motion for summary judgment will be denied, and the matter will be remanded to the Commissioner for further proceedings to determine Plaintiff's benefits. An appropriate order follows.

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F.2d 1271, 1274 (4<sup>th</sup> Cir. 1985). However, I have adhered to the Williams standard which requires additional evidence of deficient intellectual functioning during the developmental period, as that standard is, currently, binding on this Court.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

BERNICE GIST,	:	
Plaintiff,	:	CIVIL ACTION
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v.	:	
	:	NO: 02-2754
JO ANNE B. BARNHART,	:	
Commissioner of Social Security,	:	
Defendant.	:	

**AND NOW**, this \_\_\_\_\_ day of August, 2002, upon careful and independent consideration of the parties' Cross-Motions for Summary Judgment, the Report and Recommendation filed by United States Magistrate Judge Linda K. Caracappa, and Plaintiff's objections thereto, **IT IS HEREBY ORDERED** that:

- 1) The Procedural History and the Factual History of the Report (pages 1-5) are **APPROVED** and **ADOPTED** and **INCORPORATED** herein by reference;
- 2) Plaintiff's First Objection is **SUSTAINED**. Having determined under Plaintiff's First Objection that Plaintiff is entitled to a finding that she is disabled, I do not decided Plaintiff's remaining objections;
- 3) Plaintiff's Motion for Summary Judgment is **GRANTED**;
- 4) Defendant's Motion for Summary Judgment is **DENIED**; and,
- 5) The decision of the Commissioner which denied disability insurance benefits to Plaintiff is **REVERSED** and the case is **REMANDED** to the Commissioner solely for determination of benefits.

BY THE COURT,

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CLIFFORD SCOTT GREEN, S.J.